82-1581

No. _____

Office-Supreme Court, U.S.
FILED
MAR 21 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NANETTE E. QUENNEVILLE,
Executrix of the Estate of
Charles F. Quenneville

Petitioner

vs.

DELMARK COMPANY, INC.; MOUNT SINAI HOSPITAL OF CLEVELAND, and VICTOR VERTES, M.D.; SAUL M. GENUTH, M.D.; IRENE HAZELTON, M.D.

Respondents

PETITION FOR A WRIT OF CERTIORARI, WITH APPENDIX, TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Hans Scherner

VOLKEMA & SCHERNER
Suite 1006
50 West Broad Street
Columbus, Ohio 43215
(614) 221-5207

Counsel for
Petitioner

QUESTION PRESENTED

WHETHER THE TRIAL COURT SHOULD HAVE PERMITTED THE PLAINTIFF TO DISCOVER:

A. WHETHER ANY PERSONS OTHER THAN THE PLAINTIFF HAD COMPLAINED TO THE DEFENDANT HOSPITAL AND PHYSICIANS ABOUT ANY ILL EFFECTS RESULTING FROM THE USE OF THE OPTIFAST DIET, AND

B. WHETHER ANY PERSONS DIED WHILE ON THE OPTIFAST DIET, AND IF SO, WHAT THE NAMES AND ADDRESSES OF SUCH PERSONS WERE.

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The Petitioner, Nanette E. Quenneville, Executrix of the Estate of Charles F. Quenneville, deceased respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals of the Sixth Circuit entered in this proceeding on December 22, 1982.

OPINION BELOW

The Court of Appeals for the Sixth Circuit filed an opinion on December 22, 1982. A copy of the opinion appears in the Appendix hereto (App. A).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 22, 1982. This petition for certiorari was timely filed within ninety (90) days of the said date, pursuant to Rules 20 and 28, and 28 U.S.C §2101(c)

STATEMENT OF THE CASE

This case pursuant to 28 U.S.C. §1332(A), originated as a diversity action for malpractice against defendants Saul M. Genuth, M.D., Victor Vertes, M.D., Irene Hazelton, M.D. and the Mount Sinai Hospital, and for strict products liability against defendant Delmark Company, Inc. The cause of action arose out of the death of plaintiff's decedent, Charles F. Quenneville, who died on December 25, 1977 while participating in the Optifast liquid diet program administered by the defendant physicians at Mount Sinai Hospital in Cleveland, Ohio, which program used the Optifast liquid protein product manufactured by defendant Delmark; the decedent had been

treated for approximately seven months and had lost more than one hundred eighty pounds (180 lbs.).

The plaintiff filed a complaint on July 26, 1978, alleging that plaintiff's decedent had been negligently cared for and treated by the defendant physicians and the defendant hospital, while taking part in he Optifast diet program administered by those defendants; that the Optifast product, which was used in the diet program, and had been manufactured by defendant Delmark Company, was dangerously defective; and that all the defendants had failed to warn plaintiff's decedent, Mr. Quenneville of the hazards of using Optifast.

In the course of the proceedings plaintiff submitted a set of interrogatories to the defendant-physicians, who on the ground of privilege objected to answering two of the questions submitted to them. Subsequently, plaintiff filed a motion to compel these defendants to answer these two questions. (See Appendix C) On September 26, 1980, the Court issued an order denying plaintiff's motion to compel. (See Appendix B) Plaintiff's subsequent motion to reconsider was also denied.

The case went to trial before the Court and jury on May 26, 1981; and, on June 15, 1981, the jury having rendered a verdict in favor of the defendants, the

Court entered its judgment, dismissing plaintiff's complaint. The judgment was filed on June 16, 1981.

A notice of appeal and a certified record were filed; briefs were submitted; oral arguments were conducted; and on December 22, 1982 the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the trial court. (See Appendix A)

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REASONS FOR GRANTING THE WRIT

INTRODUCTION

In denying plaintiff the right to discover the names of other patients who had been on the same diet as plaintiff's decedent, the trial court unjustifiably departed from the usual and accepted course of judicial proceedings.

Such departure, as sanctioned by the United States Court of Appeals for the Sixth Circuit, thwarted plaintiff's ability to present her case and denied her a fair trial.

ARGUMENT

BECAUSE THE DISCOVERY RULES ARE "ACCORDED A BROAD TREATMENT", THE DISCOVERY OF THE NAMES OF PATIENTS IS PERMITTED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND THE PHYSICIAN-PATIENT PRIVILEGE SHOULD NOT BE EXTENDED TO PROHIBIT SUCH DISCLOSURE.

Mr. Justice Brennan in this Courts decision Reproductive Services, Inc. v. Walker, 439 U.S. 1307 (1978) stated

> The question...-whether the names of abortion patients can be obtained by discovery for use in a civil suit against a person or clinic performing abortions where, as here, the parties have not agreed to a protective order to ensure the privacy of those patients - is a serious one. If this question were in fact presented by this case, I am of the view that four Members of this Court would vote to grant certiorari to hear it.

In the case at bar, this very question is being presented even if in a different factual context.

As part of her interrogatories submitted to the defendant hospital and the defendant physician, the plaintiff asked the following questions:

> 11. Has any person other than the plaintiff herein complained to you about any ill effects resulting from the use of OPTIFAST? If there have been other such complaints, state the name and address of each complainant.
>
> 13. Please state the name and address of each and every person who died while on the OPTIFAST diet program.

The defendants objected to question eleven (11) on the ground of privilege and to question thirteen (13) on the ground of both privilege and relevancy. Plaintiff then filed a motion to compel discovery of the requested information, which was denied by the trial court. The court reached this conclusion by

distinguishing the two cases cited by the plaintiff, Nichols v. Leimbach, C69-241 (S.D. Ohio June 7, 1972), and Grant Hospital v. Nichols, 273 N.E.2d 144 (Ct. App. Franklin County 1971).

The trial court distinguished Nichols v. Leimbach, on the ground that providing names of any patients would also reveal a specific diagnosis and the prescribed treatment. It is submitted that the discovery of the names of patients who complained of ill effects of the Optifast diet or died while taking part in the program at Mount Sinai Hospital would only reveal the fact that, at the time these patients commenced the diet, they were grossly overweight. "Being grossly overweight" is not a

specific medical diagnosis, but rather an external symptom which may be observed by any lay person.

Under the applicable Ohio law, see, Conneticut Mutual Life Insurance Co. v. Union Trust Co., 112 U.S. 250, 256 (1884); Palmer v. Fisher, 228 F.2d 503 (7th Cir. 1955); Ranger, Inc. v. Equitable Life Assurance Society of the United States, 196 F. 2d 968 (6th Cir. 1952), the following portions of §2317.02 of The Ohio Revised Code are relevant to the issue in question:

> The following persons shall not testify in certain respects:
> ...
> (B) A physician concerning a communication made to him by his patient in that relation or his advice to his patient... (emphasis added)

Such statute being in derogation of the common law must be strictly construed. Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947); Carson v. Beatley, 82 N.E.2d 745 (Ct. App. Champaign County, 1948). Simply stated the observation of the physical condition of being overweight does not require any confidential communication in the sense of §2317.02 of the Ohio Revised Code.

As then Chief Judge Brennan stated

> The nature of the privilege has never been extended to prohibit the disclosure of evidence as to facts not acquired in a professional capacity. Incidents and facts which are plain to the observation of anyone are not within the prohibition. (emphasis added)

In re Albert Lindley Lee Memorial Hospital, 155 F. Supp. 643, 645 (W.D.N.Y. 1953), citing Klein v. Prudential Insurance Co. of America, 177 N.E. 942 (Ct. App. N.Y. 1917). The trial court failed to distinguish between the symptom of being overweight, and the underlying disease causing such physical condition. The symptom is plainly visible to anyone, and, therefore cannot be privileged. The disease itself, of which the plaintiff has not requested disclosure, is a matter between physician and patient, subject to the protection of §2317.02.

A similar argument can be made with respect to the treatment prescribed in the Optifast program. The basic or standard treatment used at the Optifast clinics, including Mount Sinai, consists

of semi-starvation, supplemented with a liquid supplement of amino-acids and glucose as well as certain mineral and vitamin supplements. The treatment also includes regular examinations and individualized prescriptions, and eventually a "custom-designed diet". Any details with respect to that part of the treatment are not disclosed by revealing the fact that a person has participated in the Optifast program. Such details remain privileged information, until the patient agrees to disclose them. Again the Court failed to make an important distinction; namely, between the basic principles of the program, that is protein-supplemented, semi-starvation, and individual treatment of each patient, adapted to the specific needs of every

patient. It is the individual treatment that is privileged, and that will not be revealed simply by disclosing the fact of someone's participation in the Optifast program.

The trial court distinguished Grant Hospital v. Nichols, supra, on the ground that there is hardly any need for confidentiality when patients are being treated for a "staph" infection, but that that need is obvious for people seeking treatment for obesity. In the trial court's analysis, persons with "staph" infection would be more likely to seek treatment for their condition, in spite of the possibility of becoming part of a public record, than would people who are overweight.

The stigma of obesity is attached to the condition of being overweight; being thin is fashionable; being thin is the norm. Even the Venus of Milo is "overweight" according to today's standards of fashion! For that reason alone overweight people are encouraged to lose weight, and the attitude of society is very positive towards overweight people who have the courage to deny themselves the delights of food, with which they are perpetually surrounded. A survey of newspapers and popular magazines will show, almost as a regular feature, articles about losing weight and about people who have participated in the weight loss programs. The trial court's statement that a stigma is attached to seeking treatment for obesity, so that

fear of publication would deter obese people from obtaining treatment for their condition, is entirely inconsistent with that fact. It is again inconsistent with the observation of Brennan C.J. in In re Albert Lindley Lee Memorial Hospital, supra at 646

> The court cannot understand how a person is injured by the disclosure of the fact that he has received the services and care of a hospital, and has been attended by a certain physician. These are everyday incidents of life occurring openly and with notoriety. The patient does not secrete his entry into the hospital; neither does the doctor mask his identity when entering the home or the room of his patient. Any injury to the patient is hypothetical rather than actual.

Furthermore, the information requested by the plaintiff was sought as part of pretrial discovery, where in

Ohio, the trial court may allow the exchange of privileged information. Such an exchange does not constitute a waiver. See State ex rel Floyd v. Court of Common Pleas of Montgomery County, 55 Ohio St.2d 17, 377 N.E.2d 794 (1978); Floyd v. Copas, 9 Ohio O.3d 198 (C.P. Montgomery County, 1977).

Accordingly even if names of patients were deemed privileged, which it is submitted they are not, these names should still be discoverable.

The trial court's denial of plaintiff's motion to compel discovery prevented the plaintiff from discovering information that was important for her preparation for trial. The scope of

discovery in federal actions is governed by Rule 26(b) of the Federal Rules of Civil Procedure, which rule

> has been generously construed to provide a great deal of latitude for discovery.

Harris v. Nelson, 394 U.S. 285 (1969). Rule 26(b)

> apparently envisions generally unrestrictive access to sources of information, and the courts have so interpreted it.

Horizons Titanium Corp. v. Norton Co., 290 F.2d 421, 425 (1st Cir. 1961). The same wide range of discovery has been recognized by the District Court of Ohio, Armour Research Foundation of Illinois Institute of Technology v. Brush Development Co., 9 F.D.R. 113 (1949). And it seems useful, in this context to

repeat the well-known passage from Hickman v. Taylor, where the United States Supreme Court said:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

329 U.S. 495, 507-508 (1947). As the rule itself states, it is not required that the information sought will be

admissible at trial. The information need only be relevant to the subject matter involved in the pending action. See Foundry Equipment Co. v. Carl Mayer Corp., 11 F.R.D. 108 (N.D. Ohio E.D. 1950) and Fleming v. Bernardi, 1 F.D.R. 624 (N.D. Ohio E.D. 1941). Obviously, it was relevant to the issues of plaintiff's case to find out whether any participants in the Optifast program had complained of ill-effects of the diet, or whether any participants had died while they were on the diet. It was very important for the plaintiff to discovery whether Mr. Quenneville's death was an isolated case, or whether more persons had experienced difficulties with the Optifast liquid protein diet. The trial court's denial of plaintiff's motion to compel discovery

was prejudicial in the sense that it prevented the plaintiff from discovering information that was important for her preparation for trial.

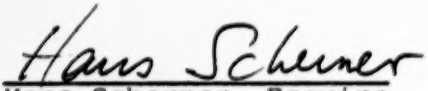
In addition, the plaintiff was prejudiced, because the trial court, by refusing to admit any evidence concerning the problems with the Optifast diet, allowed the creation of the impression that the defendants had 600,000 patient weeks of experience with Optifast without any problems, except, possibly, for the death of Mr. Quenneville. (See direct examination of defendant's expert, Dr. Norval Barker, Appendix D, F). At the end of his testimony Dr. Barker said that he did not have any knowledge of any deaths of any patients, other than Mr. Quenneville , that were related to the

Optifast program or not explained by other medical reasons. Because the plaintiff had not been allowed any discovery of this aspect of the case, she was left without any means to refute this statement of the defendant's expert witness, a circumstance that was highly prejudicial, because it left the jury with the impression that the defendant physicians and other physicians prescribing Optifast had treated 60,000 patients for an average of ten weeks each, without ever having had any complaints.

The plaintiff submits that the refusal on the part of the trial court to allow discovery of relevant information led to an unbalanced presentation of case, in favor of the defendants, all of

which warrants the resolution of the underlying issues and a new trial. Therefore the petitioner prays that a writ of certiorari be issued.

Respectfully submitted,



Hans Scherner, Esquire

VOLKEMA & SCHERNER
Suite 1006
50 West Broad Street
Columbus, Ohio 43215
(614) 221-5207

Counsel for Petitioner

CERTIFICATE OF SERIVCE

The undersigned hereby certify that one copy of the foregoing Petition for Writ of Certiorari with Appendix has been furnished to each of the following attorneys.

Louis Paisley, Esquire
Weston, Hurd, Fallon,
Paisley & Howley
25th Floor Terminal Tower
Cleveland, Ohio 44113
Attorney for Defendant
Delmark Company, Inc.

Gary H. Goldwasser, Esquire
Reminger & Reminger Co., L.P.A.
300 Leader Building
Cleveland, Ohio 44115
Attorney for Defendant
Mount Sinai Hospital

and

Robin G. Weaver, Esquire
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115
Attorney for Defendants
Victor Vertes, M.D.
Saul M. Genuth, M.D. and
Irene Hazelton, M.D.

Hans Scherner

Hans Scherner
Admitted March 28, 1983

Russell H. Volkema

Russell H. Volkema

APPENDIX

APPENDIX

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Filed December 22, 1982

No. 81-3429

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NANETTE E. QUENNEVILLE,
Executrix of the Estate of
Charles F. Quenneville

Plaintiff-Appellant

v.

DELMARK COMPANY, INC.; MOUNT SINAI HOSPITAL OF CLEVELAND, and VICTOR VERTES, M.D.; SAUL M. GENUTH, M.D.; IRENE HAZELTON, M.D.

Defendants-Appellees

O R D E R

BEFORE: LIVELY AND KENNEDY, Circuit Judges; FAIRCHILD, Senior Circuit Judge.*

This is an appeal by the plaintiff from a judgment in a wrongful death

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* The Honorable Thomas Fairchild, Senior Judge, U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

action based on a jury verdict in favor of all the defendants. There is no allegation of error in the jury instructions and the only issues relied upon by the plaintiff-appellant relate to evidentiary rules by the trial court. The trial court sustained an objection on grounds of privilege to certain pretrial interrogatories served on the defendants. In these interrogatories the plaintiff sought to discover whether other persons had complained to the defendant hospital and physicians about ill effects of the product involved or had died while using the product. Applying Ohio law, the trial court held that this information was not discoverable. The plaintiff also complains that she was denied the right to introduce evidence of changes in the product subsequent to her decedent's

death. The trial court ruled that such evidence was not admissible, relying on this court's decision in Bauman v. Volkswagenwerk A.G., 621 F.2d 230 (1980). Finally, the plaintiff charges error in the trial court's refusal to permit her to introduce rebuttal evidence.

Privileged matters are not discoverable. Rule 26(b)(1), Fed. R. Civ. P. In a civil action based on diversity jurisdiction questions of privilege are determined in accordance with state law. Rule 501, Fed. R. Evid. The district court relied on the state law in sustaining the defendants' objections to the interrogatories concerning complaints and deaths related to the product, and we find no error in that ruling. It also appears from the record that one of plaintiff's expert

witnesses had the information sought by the interrogatories available at the time of trial. This would render any error in the ruling harmless.

The purpose of plaintiff's attempt to prove a subsequent change in the product is not clear from the record. Rule 407, Fed. R. Evid. limits the admissibility of such evidence. The plaintiff argues that she offered the evidence, a label from a later version of the product with a somewhat different ingredient mix, for the purpose of impeaching the testimony of a witness who had appeared for the defendants. Though counsel for the plaintiff did state that the evidence was offered for impeachment, he stated to the district court that he would have used the evidence "for several reasons." No clear statement appears as

to how the tendered evidence would have impeached earlier testimony. Based on the record before us (some side bar conferences were not recorded) we conclude that the trial court did not commit prejudicial error in sustaining the defendants' objections to evidence of subsequent measures taken by the manufacturer of the product. We conclude further that the district court did not abuse its discretion in ruling on rebuttal and surrebuttal evidence.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

_____

Clerk

A TRUE COPY
Attest:
John P. Hehman, Clerk
By: _____
Deputy Clerk
ISSUED AS MANDATE: January 13, 1983
COSTS: None

Filed September 26, 1980

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

NANETTE E. QUENNEVILLE, etc. Plaintiff v. DELMARK COMPANY, INC. et. al., Defendants.	)	CIVIL ACTION NO. C78-915 MEMORANDUM AND ORDER

ALDRICH, J.

This is a wrongful death action. Plaintiff contends that her husband, as a direct result of being on the Optifast diet, died. Consequently, she has filed suit against the manufacturer of the Optifast diet product, the hospital where her husband was treated, and the physicians who supervised his treatment.

Now pending before the Court is plaintiff's Motion to Compel defendants to answer Interrogatories Nos. 11 and 13.

Interrogatory No. 11 request defendants to provide the names and addresses of any other patients who have complained of "ill effects" from the use of Optifast. Interrogatory No. 13 requests defendants to provide the names and addresses of any patients who have died while on the Optifast diet. Defendants' objection is based on the physician/patient privilege.

The Court denies plaintiff's motion. Plaintiff cites two cases for the proposition that the names and addresses of patients are not privilege communications, but neither of these cases is on point.

Nichols v. Leimback, C69-241 (S.D. Ohio June 7, 1972) held that providing the names and addresses of patients who had undergone surgery on a particular day was not a violation of the physician/patient privilege. Neither the type of surgery, nor the diagnosis, was requested. However, since the use of Optifast is limited to patients who suffer from morbid obesity, providing their names and addresses is publicizing the specific diagnosis and prescribed treatment of those individuals.

Grant Hospital v. Nichols, 27 O. App.2d 166 (1971) concerned only the question of whether a discovery order was a final order subject to immediate appellate review. The court, however, made a statement in dicta to the effect that neither a name or address given to

any admission clerk, nor an indication on the hospital records that a patient suffered a staph infection while hospitalized, were privileged communications. However, the stigma and embarrassment attached to a diagnosis of staph infection was certainly negligible. Hence, the need for confidentiality is not very great, if it exists at all. On the other hand, many people might be deterred from seeking necessary treatment for obesity if they become part of a public record.

Plaintiff's Motion to Compel Discovery of these names and addresses is therefore denied.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

FILED February 28, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NANETTE E. QUENNEVILLE,
Executrix of the Estate of
Charles F. Quenneville,

Plaintiff, Case No. C78-915

vs. Judge Ben C. Green

DELMARK COMPANY, et al.,

Defendants.

MOTION

Plaintiff moves the court for an order requiring the defendants, Mt. Sinai Hospital of Cleveland, Victor Vertes, M.D., Saul M. Genuth, M.D. and Irene Hazelton, M.D. to answer Interrogatories number 11. and 13.; the interrogatories and answers given are as follows:

"11. Has any person other than the plaintiff herein complained to you about any ill effects resulting from the use of OPTIFAST? If there have been other such complaints state the name and address of each complainant.

ANSWER: Yes. Objection: The names and addresses of any such patients are confidential and not subject to discovery. See Federal Civil Rule 26(b)(1).

13. Please state the name and address of each and every person who died while on the OPTIFAST diet program

ANSWER: Objection: The information sought in this interrogatory is not relevant to the subject matter of this case and is not reasonably calculated to lead to discovery of

admissible evidence. See Civil Rule 26(b)(1). Additionally the names and addresses of any such individuals would be, in any event, confidential and subject to discovery. See Federal Civil Rule 26(b)(1)."

MEMORANDUM

In order for plaintiff to show that there was a general pattern of ill effects on persons being treated with OPTIFAST it is essential for plaintiff to have the names and addresses of such patients. Giving the names and addresses of such patients does not give the plaintiff the right to probe into the medical records of these patients but it does give the plaintiff the right to contact the patients, or the families of the patients, and request permission of

these patients to examine their records, or to discover whatever information is available from the patients themselves.

Interrogatory number 13 is objected to by the defendants on the basis that an answer to such an interrogatory would not be relevant to the subject matter in this case. The requested information is relevant to the subject matter in this case. The plaintiff would like to know whether or not the people who died while on this OPTIFAST diet died as a result of the OPTIFAST diet or as a result from some other condition. Again, by this means plaintiff can show a general pattern of catastrophic results from the use of this diet program.

Respectfully submitted,

VOLKEMA & SARAP

Russell H. Volkema
Attorney for Plaintiff
88 East Broad Street, Suite 260
Columbus, Ohio 43215
Phone: (614) 221-5207

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion and Memorandum upon Robin G. Weaver, Attorney for Defendants Victor Vertes, M.D., Saul M. Genuth, M.D. and Irene Hazelton, M.D., 1800 Union Commerce Building, Cleveland, Ohio 44115; Crawford Morris, Attorney for Defendant Mt. Sinai Hospital of Cleveland, 1144 Union Commerce Building, Cleveland, Ohio 44115 and Timothy T. Reid, Attorney for Defendant Delmark

Company, Inc. 1404 Rockefeller Building Cleveland, Ohio 44113 by U.S. Mail, postage prepaid, on this 26th day of February, 1979.

Russell H. Volkema

By Mr Paisley:

Q. Now, you heard, I think, Dr. Sours or Dr. Hardie, one or the other, say that liquid protein or, at least, Optifast as use in the program would not sustain life.

Would you tell us, did you pursuant to my request, determine how many patient weeks Optifast has been used to date.

A. Yes, I did.

Q. And what is that?

A. 600,000 patient weeks.

Q. How does that translate to number of patients?

A. This would be about 60,000 patient.

Q. And other than the claim made here in this courtroom regarding Mr. Quenne-ville, do you have any knowledge of any deaths on any of the other 60,000 patients?

A. Not as related to the program or that were not explained by other medical reasons.

MR. PAISLEY: Thank you.

MR. SCHERNER: Your Honor, before beginning cross-examination, could we approach the bench?

(Discussing ensued off the record out of hearing of the jury at side bar.)

By Mr. Paisley:

Q. One Point, Doctor, before I sit down, as of the end of 1977, how many patient weeks, do you recall?

A. As I recall it would be approximately 250,000 patient weeks.

Q. How would that translate to patients?

A. This would have been 25 to 30 thousand patients.

MR. SCHERNER: Your Honor, you also requested me to bring up the two other issues regarding the questions that I have.

I request to be permitted to ask in reference to the 60,000 patients and 600,000 patient weeks --

THE COURT: Hours on the Optifast.

MR. SCHERNER: I just wanted to indicate that I requested the right to ask questions in view of the Court's ruling not to mention Optifast-70.

I requested the Court's permission to ask questions for impeachment purposes under Rule 407 regarding the fact that some of the 60,000 patient weeks were in fact not with Optfiast as it was being utilized in 1977.

At that time it was my understanding that the Court overruled, or at least --

THE COURT: The Court indicated, I think, when that question was aksed to direct, that you did not object to the question, but wasn't until your cross-examination to suggest to the Court that you be permitted to mention the fact that Optifast had changed its formula after the the death of Mr. Quenneville.

And the Court had ruled a long time back that the evidence would not be admissible as being highly prejudicial. It's Rule 60 something.

MR. SCHERNER: 407.

THE COURT: Yes.

MR. SCHERNER: I would just like to proffer the evidence of what that would have presented, for impeachment purposes.

I would have asked just one question and not a series of questions.